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No. 10-796

IN THE

Supreme Court of the United States

STATE COMPENSATION INSURANCE FUND,

Petitioner,

v.

NANCY HOFFMEIER ZAMORA, Chapter 7 Trustee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly applied the plain language of the Bankruptcy Code and the weight of authority in affirming summary judgment in favor of Nancy Hoffmeier Zamora, the Chapter 7 trustee ("Respondent") on the basis that all of the elements of 11 U.S.C. § 547 were met with respect to the criminal restitution payment made by Jeffrey and Faye Silverman ("Debtors") to the State Compensation Insurance Fund ("Petitioner").

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STATEMENT OF THE CASE

Through the Petition for a Writ of Certiorari (the "Petition"), Petitioner seeks to rewrite the plain language of the Bankruptcy Code and to create law in direct conflict with the fundamental bankruptcy policy of equality of distribution. Petitioner's attempt to solicit this Court's review by raising federalism concerns falls far short of the "compelling reasons" set forth in Rule 10 of the *Rules of the Supreme Court of the United States* for the exercise of this Court's jurisdiction.

Contrary to Petitioner's assertions, the Ninth Circuit, consistent with this Court's holding in *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), found that 11 U.S.C. §547(b) does not create an exception for criminal restitution payments. The rationale applied by this Court in *Kelly* regarding whether a debt is dischargeable under 11 U.S.C. §523 does not apply to whether a payment is recoverable as a preference pursuant to 11 U.S.C. §547(b). In *Kelly*, this Court's concern was the invalidation of the results of a state criminal proceeding. *See Kelly* 479 U.S. at 47. This concern is not implicated in the recovery of a preference payment pursuant to 11 U.S.C. §547(b).

Petitioner presents no compelling reasons for the Petition to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Ninth Circuit's August 12, 2010 opinion (the "Ninth Circuit Opinion") is in conflict with a decision of this Court or another Court of Appeals or that the Ninth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)–(c).

Simply put, Petitioner fails to carry its burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any other Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not met its burden of demonstrating any compelling reasons for the Petition to be granted. *See* Sup. Ct. R. 10.

A. There is No Exception to the Plain Language of 11 U.S.C. §547(b) for Criminal Restitution Payments

Although Petitioner suggests otherwise, this case does not involve federalism concerns and whether those concerns take precedence over the distribution of assets in a chapter 7 bankruptcy case. The focus of this case should be on the fundamental policy underlying the Bankruptcy Code, and specifically, the preference statute. The preference statute has two purposes: first, avoidance power promotes prime bankruptcy policy of equality of distribution among creditors by ensuring that all creditors of same class will receive same pro rata share of debtor's estate; and, second, by providing for recapture of last minute payments to creditors, avoidance power reduces incentive to rush to dismember financially unstable debtor. *Matter of Smith*, 966 F.2d 1527, 1535 (7th Cir. 1992), *certiorari dismissed* 506 U.S. 1030 (1992). Petitioner requests that this Court create a judicial exception to the plain language of 11 U.S.C. §547(b) that would directly

conflict with the policy of insuring that all creditors receive equal distribution from available assets of the Debtors.

This Court holds that "starting point in every case involving construction of a statute is the language itself." *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 726, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). The Ninth Circuit holds that "the starting point for our interpretation of a statute is always its plain language." *U.S. Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1032 (9th Cir. 2009). "The plain meaning governs unless a clearly expressed legislative intent is to the contrary, or unless such plain meaning would lead to absurd results." *Dryer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). "To determine plain language we consider 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Rowe*, 559 F.3d at 1032. The plain language of 11 U.S.C. §547(b) does not make an exception for the recovery of criminal restitution payments. Petitioner, recognizing that no such exception exists in the statute on its face, argues that an exception should be created for criminal restitution payments. Petitioner fails, however, to offer any legislative history or public policy reasons to support the creation of any exception. Unlike the case in *Kelly*, there is no historical justification or compelling policy reason to support the creation of this exception.

Petitioner does not recognize that the fundamental purpose of 11 U.S.C. §547(b) is to "facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor." *Valley Bank v. Vance (In re Vance)*, 721 F.2d 259, 260 (9th Cir. 1983) (citing H.R. Rep. No. 95-595, pt.3, at 177-78 (1977), *as reprinted in*

1978 U.S.C.C.A.N. 5963, 6138). Moreover, Section 547(b) furthers this policy goal of equality of distribution by treating a debtor's bankruptcy estate as having been created ninety days prior to the debtor's bankruptcy filing. *See County of Sacramento v. Hackney (In re Hackney)*, 93 B.R. 213, 218 (Bankr. N.D. 1988). Pursuant to Section 547(f) of the Bankruptcy Code, there is a presumption of a debtor's insolvency on and during the 90 days immediately preceding the date of the filing of the petition. 11 U.S.C. §547(f). Since an insolvent debtor has no equity in the bankruptcy estate, then any payments made by the debtor during this time period are considered to have in fact been made by the other creditors of the estate, not by the debtor. *In re Hackney*, 93 B.R. at 218. It is this inequity that the preference statute serves to redress. *Id.*

Instead of allowing for a more equitable distribution of assets from the bankruptcy estate, the creation of an exception under Section 547(b) for the recovery of non-dischargeable debts like criminal restitution payments would allow a debtor to pay off non-dischargeable debts during the preference period and leave other creditors with no distribution. If an exception under Section 547(b) were created for criminal restitution payments, then debtors would be motivated to pay off non-dischargeable debts during the preference period and leave their other debts discharged through the bankruptcy. As noted in the Ninth Circuit Opinion, if the Debtors' entire bankruptcy estate were worth the $101,531 paid by Debtors to Petitioner and this payment were not recoverable by Respondent, then the payment of this debt pre-petition would enable Debtors to emerge from bankruptcy debt-free without any distribution being made to their other creditors. (Petitioner's brief, at Appendix 14). This result frustrates

the purpose of the preference statute and the Bankruptcy Code. The plain language of 11 U.S.C. §547(b) does not make an exception for criminal restitution payments and there is no historical justification for creating an exception. As such, the Petition should be denied.

B. The Preference Payment Was Made to or for the Benefit of Petitioner, a Creditor

Respondent also argues that one of the elements of 11 U.S.C. §547(b) has not been met because the criminal restitution payment was not "to or for the benefit of a creditor." 11 U.S.C. §547(b). Respondent improperly relies on this Court's holding in *Kelly* to support its position.

Kelly holds that criminal restitution payments are nondischargeable debts under 11 U.S.C. §523. As noted in the Ninth Circuit Opinion, this Court in *Kelly* examined whether criminal restitution payments were "to and for the benefit of a governmental unit" and "not compensation for actual pecuniary loss." *Kelly*, 479 U.S. at 52. The examination in this case, however, is whether a payment was made "to or for the benefit of a creditor" under 11 U.S.C. §547(b). The Ninth Circuit Opinion notes that the two standards are not mutually exclusive. (Petitioner's brief, at Appendix 19). It may be that a criminal restitution payment benefits society as a whole, but also compensates the victim for its loss.

Petitioner argues that merely because a payment is "to and for the benefit of society" under 11 U.S.C. §523(a)(7), the payment cannot also be "to or for the benefit of a creditor" under 11 U.S.C. §547(b)(1). This Court's holding in *Kelly* does not make this legal conclusion. As stated

in the Ninth Circuit Opinion, it does not make sense to hold that a restitution payment, which benefits society as a whole, cannot also benefit the victim, who is paid from the criminal restitution payment. (Petitioner's brief, at Appendix 20). Moreover, this Court holds in *Kelly* that the fact that restitution payments are not assessed for the purpose of compensating the victim does not preclude this Court's finding that restitution payments may nonetheless benefit the victim recipients. *Kelly*, 479 U.S. at 52. The Ninth Circuit recognizes that a holding to the contrary would frustrate the purposes of the preference statute and, as such, the Ninth Circuit did not read *Kelly* to hold that restitution payments are exclusively "to and for the benefit of society as a whole." (Petitioner's brief, at Appendix 20).

The criminal restitution payment in this case was calculated by Petitioner based upon Petitioner's estimate of the loss it suffered. (Petitioner's brief, at Appendix 30). Petitioner cannot argue that it did not benefit from the payment when the amount of the payment was based upon its own estimated loss. Debtors also made the criminal restitution payment via a cashier's check made payable only to Petitioner. (Petitioner's brief, at Appendix 17-18). Petitioner clearly received a benefit from this payment and, as such, the definition of "to or for the benefit of the creditor" is met. Even the California Penal Code, upon which Petitioner relies, notes that the amount of restitution awarded is "based on the amount of loss claimed by the victim." California Penal Code §1202.4(f).

The California Penal Code also holds that "in addition to any other penalty provided or imposed under the law, [the court] shall order the defendant to pay . . .

[r]estitution to the victim . . . which shall be enforceable *as if the order were a civil judgment.*" California Penal Code § 1202.4(a)(3)(emphasis added). As noted in the Ninth Circuit Opinion, Petitioner's ability to enforce the criminal restitution order as a civil judgment further establishes Petitioner's interest and benefit in the payment because Petitioner has extensive control and discretion over the payment's execution. (Petitioner's brief, at Appendix 17). Therefore, the criminal restitution payment made to Petitioner satisfies all of the elements of 11 U.S.C. §547(b) as it was made "to or for the benefit of" Petitioner.

There is no evidence to support the creation of a judicial exception to the plain language of 11 U.S.C. §547(b) for criminal restitution payments. More importantly, the creation of an exception for criminal restitution payments does not make sense in light of the policy goals of the preference statute to create equality of distribution to creditors. Moreover, because the payment was "to or for the benefit of" Petitioner, all of the elements of 11 U.S.C. §547(b) have been met.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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